programming options presented to the consumer today has created an intensely competitive market for viewers and national and local advertising revenues.[46] At the same time, competition has reduced the share of such revenues received by a single entity.[47] In today's multichannel, multioutlet video market, every video program supplier and distributor is constrained by the unforgiving forces of a highly competitive marketplace.

In addition, consumers easily can step outside of the video programming market to obtain timely news, information and entertainment programming. Like television, the number of radio stations has grown dramatically, such that, today, the average DMA has approximately *84* commercial radio stations.[48] Those markets also boast an average of *18* newspapers reaching over 1,000 readers and *10* news magazines with at least a five percent penetration rate.[49] Even more significantly, the Internet has experienced explosive growth in the past five years. Chairman Kennard observed just last month that 75 million Americans now use e-mail and that number is expected to almost double in just three years.[50] And, according to the Newspaper Association of America, more Americans use the Internet than subscribe to daily newspapers.[51] Americans can select from among an unquantifiable number of web sites both here and abroad

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46/ *See, e.g.*, NBC Comments at 4.

47/ *See id.*

48/ NAB Comments at 5 (citing *Media Outlets by Market - Update).*

49/ *Id.*

50/ Chairman William E. Kennard, Remarks before the National Association of Regulatory Utility Commissioners (July 27, 1998), at 3.

51/ Comments of the Newspaper Association of America, MM Docket No. 98-35, filed July 21, 1998, at 36.

for news, information and even real-time video and audio programming. As eloquently noted by NAB, "[c]ompetition for the eyes and ears of the American public has never been greater and the prospects for further competition have never been more promising."[52]

Today's world of seemingly endless choices for information and entertainment fuels fierce demand for viewers and advertisers among television, cable, DBS, radio, newspapers, magazine and Internet content providers. This competition, in turn, assures the presence of multiple media viewpoints in national and local markets. Indeed, the market has now succeeded in accomplishing the important goal of providing a plurality of viewpoints, a goal which lies at the very center of the Commission's broadcast ownership regulatory scheme. It is simply impossible to believe that in an environment with scores of broadcast stations in each local market, 100-channel cable and DBS systems, and widespread Internet usage, the UHF discount will have an adverse impact on the diversity of viewpoints available to American consumers.[53]

Finally, the UHF discount need not even be factored into the Commission's analysis of

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[52] NAB Comments at 4-5.

[53] Contrary to the suggestion of some commenters, "large broadcast ownership groups" simply cannot "monopolize the available viewpoint outlets," thus causing a reduction in viewpoint diversity. *See* CME Comments at 8. Broadcast owners are subject to a number of significant FCC and antitrust constraints on the numbers and types of "viewpoint outlets" they may own (*e.g.*, broadcast/newspaper cross-interest ban, broadcast/cable cross-interest ban, one-to-a-market rule, local radio ownership rules, etc.). As a result, an attempt to acquire an excessive number of viewpoint outlets in a given market is legally impossible. Given the growth in broadcast stations, cable penetration and other media over the past decade, such a reduction in outlets also is practically and financially impossible. In addition, the sheer number of video program suppliers and distributors competing at the national, regional and local level for every broadcast, cable and DBS viewer ensures that a handful of broadcasters are unable to "control" the public's video programming options. In any event, CME's documentation of a few anecdotal examples of broadcasters' possible attempts to influence the content on one or more owned stations by citation to media outlets in fact demonstrates that such efforts are quickly (and often harshly) publicized by the broadcasters' competitors in the fierce market for viewers and readers.

local competition and diversity of viewpoints . Whether or not the FCC retains the UHF discount, broadcasters will remain subject to the television ownership rules which restrict the number of stations a single entity may own in a local market.[54] Even with the changes to the ownership rules that have been proposed, including Paxson's proposal set forth in its Comments,[55] broadcasters essentially will be limited to owning one television station per market. The UHF discount, accordingly, will not change the ownership or competitive structure of local markets.

F. The Increase in the National Audience Cap Has Not Eliminated the Need for the UHF Discount.

There is no basis for any argument that the increase in the national audience cap to 35% eliminates the need for the UHF discount. ALTV's Comments make it quite clear that there was no intent on the part of Congress in enacting the Telecommunications Act of 1996[56] to substitute the 35% cap for the then-existing 25% cap coupled with the UHF discount.[57] Indeed, had Congress intended a change in or elimination of the UHF discount, it surely would have included such a provision in the 1996 Act.

Moreover, as noted by ALTV, Congress's clear intention in adopting the 35% cap and eliminating the numerical limit on station ownership was *to relax*, not tighten, the national ownership limits. Elimination of the UHF discount would plainly run counter to Congress's

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[54] 47 C.F.R. § 73.3555(b) (1997).

[55] Paxson Comments at 31.

[56] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").

[57] ALTV Comments at 2-3.

intent. A 35% national audience reach cap without the UHF discount *would be more restrictive* than a 25% cap and the UHF discount! For instance, based on its current ownership and assuming it retained ownership of its stations in the largest markets, under a 25% cap and the UHF discount, Paxson would be permitted to own 29 stations nationwide. If Paxson were subject to the 35% ownership cap, and without applying the UHF discount, it would be permitted to own only 13 television stations. Clearly, this is not the result that Congress intended when it enacted the 1996 Act.

III. THE NATIONAL OWNERSHIP RULE.

Paxson reaffirms the proposal set forth in its Comments that the Commission increase the national audience share cap to 40%. A 40% limit would reflect the realities of the video programming marketplace, as described above, with no impact on diversity and competition in local markets. An increase in the audience share cap also would result in increased investment in small-market and minority-owned television stations.

To establish truly meaningful incentives for minority and small business investment, Paxson proposes that the Commission not apply the audience share cap to ownership interests in stations owned and controlled by minority entities and new entrants, or in the alternative, increase the cap above 40% with respect to those stations that would be minority-owned.

Earlier this year, FCC Chairman Kennard called upon broadcasters to identify ways to increase minority ownership of broadcast stations.[58/] Numerous broadcasters, including Paxson, have responded to the Chairman's call. On July 1, 1998, Paxson submitted to Chairman Kennard

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58/ William E. Kennard, *An Era of Opportunity*, Remarks to National Association of Broadcasters, Las Vegas, Nevada (Apr. 7, 1998).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
Definition of Radio Markets	)	MM Docket No. 00-244

REPLY COMMENTS OF
PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation
601 Clearwater Park Road
West Palm Beach. FL 33401

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Dated: February 3, 2003

SUMMARY

The record compiled in this proceeding establishes two points beyond dispute. First. the Commission must immediately and significantly reform the broadcast television ownership restrictions under review. No evidence has been provided to indicate that these restrictions are indispensable to the public interest. Accordingly, under the strict mandate established by Congress and the D.C. Circuit Court of Appeals, the Commission has no choice but to relax these restrictions. Paxson proposed in its Comments and reiterates here its view that the Commission should begin dismantling the ownership restrictions in a measured manner, by (1) immediately increasing the national ownership cap to 50% with a presumption that the cap will be increased biennially by 2.5% until it reaches 60%; (2) eliminating the newspaper/broadcast cross-ownership rule; and (3) reforming the duopoly and radiohelevision cross-ownership rules. Only by beginning this deregulatory process now can the Commission fulfill Congress's commands as interpreted by the courts, and avoid further legal challenges.

Second, the record conclusively demonstrates that the Commission must retain the UHF discount. As Paxson has pointed out, the deregulatory biennial review proceeding is not the preferred vehicle for considering the UHF discount, because the discount already is deregulatory in nature. Accordingly, retention of the UHF discount should not be subject to the same strict standard applied to the review of the Commission's ownership *restrictions* required by this proceeding. In any case, the record reveals that the UHF discount produces no harms and many benefits to the public interest. The UHF discount remains necessary to level the competitive playing

field for UHF and VHF broadcasters and continues to preserve the profitability of UHF broadcasting, which is the backbone of the construction and emergence of competitive broadcast networks. The Commission decided just two years ago to retain the UHF discount at least until the end of the DTV transition, and no evidence has emerged since that would justify eliminating the discount earlier. Accordingly, the Commission should provide a strong statement that the UHF discount will remain in place at least for the remainder *of* the DTV transition, and that's its post-transition existence will be determined in a later proceeding.

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REPLY COMMENTS OF
PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation ("Paxson") hereby files these Reply Comments in the above-captioned proceeding[1] to emphasize two points. First, the record in this proceeding does not give the FCC sufficient evidence to retain in their current form the 35% national broadcast television ownership cap, the newspaper/broadcast cross-ownership rule, the duopoly rules, or the radio/television cross-ownership rules. Congress and the D.C. Circuit have placed a high burden on the

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[1] See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, 17 FCC Rcd 18503 (2002) (the "*Ownership NPRM*"). See also FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes

Commission to justify these rules and the current record does not satisfy the required legal standard. Accordingly, the Commission now must significantly loosen these ownership restrictions with an eye toward eventually considering their repeal, or the courts likely will throw them out in their entirety.

Second, both the record and sound public policy considerations overwhelmingly support retention of the UHF discount, regardless of any adjustments the Commission makes to the national ownership cap. Only one commenter, a group led by the United Church of Christ ("UCC"), filed comments urging elimination of the UHF discount. Its argument relied solely on information previously before the Commission when the issue was last addressed, and the UHF discount retained, in the 1998 Biennial Review.' The Commission fully considered these arguments then, and no intervening factors have arisen to undermine the Commission's fundamental conclusion that the UHF discount will remain necessary in the public interest at least until the end of the DTV transition.

UCC's argument against the UHF discount and the various arguments presented in favor of retaining the Commission's other ownership restrictions are part of a misguided attempt to divert the Commission from the statutory deregulatory focus of the

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Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Ownership Rules, Public Notice, DA 02-2476 (rel. October 1, 2002).

[2] See Comments of the Office of Communication, Inc. of the United Church *of* Christ, Black Citizens for A Fair media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press, filed January 2, 2003, at 56-58 ("UCC Comments"); see also 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Biennial Review Report, 15 FCC Rcd 11058, 11078-80 (retaining UHF discount) *("7998* Biennial Review").

biennial review process and instead convert it into a vehicle for re-regulation.[3] These arguments fail to marshal any relevant facts or evidence to support the Commission's current rules or elimination of the UHF discount. The Commission must resist any temptation to re-regulate without any supporting evidence, if it intends to fashion rules that will survive judicial review.[4]

I. The Evidence in This Proceeding Does not Satisfy the Heavy Burden Congress and the D.C. Circuit Have Placed on the FCC to Justify Retention of Its Ownership Restrictions.

As Paxson described in its Comments, the Commission's television ownership restrictions have been rendered superfluous by the wave of diversity and competition that has swept the broadcast television and video entertainment industries over the past twenty year.[5] The Commission's failure to justify the 35% national television ownership cap in the face of current competitive realities led the D.C. Circuit to reverse the Commission's retention of the rule and instruct the Commission to either develop a convincing record supporting any national ownership cap or abandon it.[6] This same rigorous standard now must be satisfied to allow retention of any of the Commission's ownership restrictions currently under review.

Supporters of the ownership restrictions have had many months to provide whatever evidence would support the continuation of these rules. The FCC itself has

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[3] See, *e.g.*, Comments of the American Federation of Labor and the Congress of Industrial Organizations, filed January 3, 2003; Comments By the Coalition for Program Diversity, filed January 3, 2003.

[4] See Michael K. Powell, *Should Limits on Broadcast Ownership Change? Yes.*, USA TODAY, January 22,2003, at 11A.

[5] See Paxson Comments at 7-8.

expended unprecedented time and resources to develop studies of the current media marketplace and to hold public forums and hearings to entertain public input on ownership issues. No evidence provided to date by the Commission's studies or by public commenters supports retention of the Commission's ownership restrictions. It is not the Commission's responsibility to look further to find justifications for the 35 % cap or its other ownership restrictions: no such justifications exist. To be sure, several commenters have alleged that evils flow from media consolidation generally,[7] but these allegations amount to little more than the simple and unsupported argument that "big is bad." What is missing is any evidence that "big is bad," or, more to the point, that lifting the television ownership restrictions will harm the public.

The Commission has heard this "big is bad" argument from members of the public and individual members of Congress.[8] Of course these voices cannot be ignored, but it is equally important that they be analyzed as opinions, not as fact, and be given no more weight than they deserve. Neither political statements nor public opinion can overly influence the Commission and no unsupported fear of the effects of relaxing the ownership rules can support any Commission regulation. Certainly, statements of opinion cannot be treated as evidence that concrete harms will be caused by relaxation of the ownership rules.

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[6] See *fox* Television Stations v. *FCC*. 280 F.3d 1027 (2000), rehearing granted in *part*, 293 F.3d 537 ("*FOX JV* Stations Rehearing").

[7] See *e.g.*, Comments of Consumer Federation of America, Consumers Union, Center For Digital Democracy, and Media Access Project; Comments of American Federal Of Labor and Congress of Industrial Organizations.

[8] See, *e.g.*, Bill McConnell, *A* Weary Powell *Gets* Thumped on Dereg, *but* He Tells Senate Panel That *Critics' Tales* are Melodramatic. BROADCASTING AND CABLE, Jan. 20, 2003, at 5.

To the contrary, there is ample evidence that, in many cases, bigger is better. Below, Paxson will describe the significant public interests served by allowing broadcasters to take advantage of the economies of scale and efficiencies offered by the UHF discount.[9] Many commenters have shown persuasively the value of broadcast/newspaper combinations." The Commission has recognized the benefits of consolidated ownership in other contexts as well." As Paxson pointed out in its Comments, viewers reap many benefits from large media companies, such as better and more diverse programming choices.[12] More importantly, there is no evidence or indication that the existence of large media corporations is undermining the Commission's traditional policies of preserving localism and diversity. The record simply presents no evidence that the big media corporations feared by commenters in favor of the ownership restrictions are making it any more difficult for small and locally oriented broadcasters to survive. The market will always demand diversity and localism. There is no evidence that the current ownership restrictions are necessary to achieve these goals

The burden is not, however, on television broadcasters to show the benefits of lifting the ownership restrictions. As the Commission well knows, without evidence of

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[9] See Section II, infra.

[10] See, *e.g.*, Comments of Gannett Co.. Inc. at 4-7; Comments of the National Association of Broadcasters at 60-67.

[11] Amendment of Section 73.658(g) of the Commission's Rules - The Dual Network Rule, *Report* and Order, 16 FCC Rcd 11114, 11122-23, 11123-24 (2001); Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report* and Order, 14 FCC Rcd 12903, 12930 (1999) ("*Duopoly* Order").

[12] See Paxson Comments at 13-14.

any concrete harm that will flow from relaxation of the ownership rules (and no such evidence exists), the rules cannot be sustained in their present form. Nonetheless, Paxson has not argued that all the ownership rules must be swept away wholesale.

Instead, Paxson has proposed a measured approach that would allow the Commission to carry out Congress's deregulatory purpose without foreclosing future regulatory remedies to correct any imbalances that deregulation might cause. For example, with respect to the 35% national television ownership cap, Paxson has proposed an incremental relaxation first to 50%, with a presumption that the limit would increase by 2.5% with each biennial review until the cap is at 60%. This course would allow the Commission to both give the regulatory relief demanded by the record while retaining enough control to reverse course if public harms materialized. Similarly, in the duopoly context, Paxson has proposed a reasonable set of reforms, even though the record fails to show the need for any local television ownership restrictions. This reasonable approach compares favorably to the often fevered arguments made in favor of retaining the restrictions in their current form. Given the strict statutory standard the Commission must meet in justifying its ownership restrictions going forward. a measured, deregulatory approach is the only defensible position.

The FCC simply does not have a record to support retention of the existing rules. Faced with the evidence before it, the Commission should not need the threat *of* legal action to choose the Congressionally-mandated course of deregulation. Nonetheless, that threat looms if the FCC retreats from deregulation. The broadcast industry surely will take the FCC to court. Given the state of the record and the previous chances the D.C. Circuit has given the Commission to adhere to Congress's deregulatory directives, if the Commission retains the current rules, they most likely will be thrown out in their entirety. Consequently, if the Commission believes that relaxation of the rules eventually may cause public harm, the worst thing it could do would be to try to retain the rules in their current form. If the Commission wants to remain in the business of regulating broadcast ownership, its only choice is to begin reforming them as Paxson has suggested.

II. PAXSON HAS DEMONSTRATED THAT THE UHF DISCOUNT IS NECESSARY IN THE PUBLIC INTEREST.

As Paxson explained in its initial Comments, the UHF discount continues to advance several vitally important public interest goals.[13] Less than three years ago, in the 1998 Biennial Review, the FCC agreed, affirming that the UHF discount remained necessary to allow UHF station owners to effectively compete with their VHF counterparts.[14] The same remains true today.

For example, the Commission recognized that as long as UHF stations broadcast NTSC signals, their inferior signal coverage area undermines their ability to reach both over-the-air viewers and cable head-ends, severely restricting their ability to reach the majority of viewers in their markets.[15] As Paxson demonstrated in its Comments, these handicaps remain.[16] UCC disputes that UHF broadcasters' signal inferiority remains significant, but its argument relies solely on Commission statements in the Prime Time

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[13] See Comments of Paxson Communications Corporation, filed January 2, 2003, at 15-20.

[14] See 1998 Biennial Review at 11078.

[15] See *id.*

[16] Paxson Comments at 15-18

Access Rule and Duopoly proceedings." Each of these proceedings were resolved before the Commission preserved the UHF discount" and cannot now form the basis for elimination of the discount.

Further, the Commission must continue to recognize that the added expense *of* constructing and operating UHF stations undermines UHF broadcasters' competitive position.[19] This gap has not closed in the past three years, and there is nothing on the horizon to indicate that analog UHF stations ever will be operated as cheaply or as effectively as VHF stations. As described in greater detail below, the burden of operating both an analog and digital station during the transition falls especially hard on UHF broadcasters that already pay increased operating costs.

Accordingly, UHF broadcasters must be permitted to take advantage of the economies *of* scale that the discount makes possible. Allowing large group ownership of UHF stations, and the efficiencies thereby realized, encourages diversity in mass-market programming by promoting the growth of competitive networks. Networks like the WB and UPN rely almost entirely upon UHF stations to distribute their programming, so the health and stability of UHF broadcasters is keenly important to their continued growth." The growth of the PAXTV network also demonstrates the utility of the rule in

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[17] UCC Comments at 58 (citing Review of the Prime Time Access Rule, § 73.658(k) of the Commission's Rules, Report and Order, 11 FCC Rcd 546, 583-84 (1995) ("*PTAR* Order"): Review of the Commission's Regulations Governing Television Broadcasting, *Report* and Order, 10 FCC Rcd 4538,4542 (1995)).

[18] Indeed, the Commission even cited one of these Orders in upholding the UHF discount. See *1998* Biennial Review at n.105 (citing *PTAR* Order, 11 FCC Rcd 546, 583-86).

[19] See *1998* Biennial Review at 11078.

[20] See Paxson Comments at 20.

this regard. The PAXTV network now covers over 87% of the country, enabling Paxson to provide family-oriented mass-market programming that would not be available if Paxson were at the mercy of the established broadcast networks or cable operators who seem chiefly interested in outdoing each other with the level of sex and violence they are willing to inject into their programming." These examples show that UCC's myopic argument that the discount undermines diversity cannot be sustained. It is equally important that the Commission preserve a diversity of station owners capable of reaching the mass market as it is that other diverse programming sources be preserved.

In addition to failing to recognize the considerable public benefits produced by the UHF discount, UCC offered no justification for the disruption that would ensue if the Commission eliminated the UHF discount without grandfathering the interests of owners like Paxson, who have pursued innovative and valuable business plans based on the UHF discount." The entire basis and purpose of the biennial review process is to ensure that the Commission's ownership rules continue *to* preserve and promote competition, yet UCC makes no effort to address the essentially anti-competitive effects that would be brought about by elimination of the UHF discount without grandfathering. Thus, even if the Commission were to eliminate the UHF discount on a going-forward basis, current ownership interests must be grandfathered with free assignability going forward.

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[21] See Opening Remarks of Commissioner Kevin J. Martin, Family Programming *Forum*, Annual Conference of National *Association of Television* Program *Executives,* January *22. 2003,* available at http:l/www.fcc.govlSpeeches/Martin/2003/spkjm301 .pdf, at 1, 2.

[2] UCC's comments further identify several other station owners that would be required to divest their interests if the UHF discount were eliminatec'. UCC Comments at 49.

A. NO DEVELOPMENTS SINCE THE 1998 BIENNIAL REVIEW SUPPORT ELIMINATION OF THE UHF DISCOUNT.

The only relevant change that has occurred since the Commission last upheld the UHF discount is that a greater number of homes now are receiving cable and DBS service. This fact fails to provide any justification for eliminating the discount. Because at least fifteen percent of viewers and thirty percent of televisions still receive television signals over-the-air, this remains an important part of UHF broadcasters' revenue stream, directly and significantly impacting their competitive position. Fifteen percent of viewers and thirty percent of television sets may be a smaller audience than ten or even three years ago, but the dollars those viewers add to stations' advertising revenues represent the difference between profit and **loss** for many stations. Although UHF stations need to be able to reach these viewers, VHF stations, with their stronger signals, still are able to reach more of them. Consequently, UHF stations' inability to reach an over-the-air audience commensurate with their VHF counterparts still impacts their competitive position

UCC relies on the flip side of this equation – the increase in cable and DBS penetration – to justify elimination of the UHF discount.[23] This development has not significantly improved UHF stations' competitive position. Because stations are required to place a good quality signal over cable headends. the must-carry rules do little more than perpetuate the disparity in signal reach that already exists between UHF and VHF stations. Because UHF stations cannot reach as many cable headends in their DMAs with a quality signal, they are forced to either forgo carriage or enter into

[23] See UCC Comments at 57-58

expensive arrangements for signal delivery. Moreover, as Paxson has detailed in the past, some cable operators actively resist carrying UHF stations in their market, often with the effect of preserving channel capacity for their own affiliated programming.[24] Eliminating the UHF discount and the efficiencies that it provides will only result in fewer station owners capable *of* resisting these efforts and fewer choices for over-the-air and cable television viewers alike. Reliance on DBS penetration is even more misguided. DBS does not offer local-into-local service in most communities. and such service is all but non-existent in the mid-sized and smaller markets where UHF broadcasters are most handicapped.

B. THE DTV TRANSITION HAS NOT PROGRESSED SUFFICIENTLY TO JUSTIFY ELIMINATION OF THE UHF DISCOUNT

The Commission should adhere to the course it charted in the *1998* Biennial Review, when it stated that it would consider the need for the UHF discount again near the close of the DTV transition.[25] The Commission reasoned that reconsidering the UHF discount at the close of the transition would be in the public interest because it believed that the transition would eliminate the UHF-VHF disparity.[26] Although Paxson disagrees with this *conclusion*,[27] there will be ample time to debate that question when the Commission squarely presents it near the transition's close. **At** this point, despite the remarkable progress that the transition has made in the last year, even the most optimistic observers recognize that the end *of* the DTV transition still is years away

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[24] See Reply Comments of Paxson Communications Corporation, MM Docket No. 98-35. filed August 21, *1998,* at *5-9* ("Paxson *1998* Biennial Reply Comments").

[25] See *1998* Biennial Review at 11079-80.

[26] See id.

Consequently, any reasoning that relies on post-transition conditions to justify elimination of the discount cannot be sustained.

Indeed, for UHF broadcasters, the transition itself is the worst of both worlds, because they are handicapped not only by traditional signal inferiority and the higher costs of station operation, but also by the costs of the transition – including construction costs and the added power expense of operating two stations.[28] Eliminating the discount now based on predictions about post-transition conditions would therefore be not only premature, but in many ways, perverse. The added burdens of the transition require that UHF broadcasters be permitted to continue to realize the efficiencies that the discount permits.

Thus, the FCC must reject UCC's invitation to re-regulate UHF broadcasters at this sensitive point in the DTV transition. The Commission should not even consider undermining UHF broadcasters' competitive position on the heels of their larger-scale investment in DTV facilities. To devalue these stations by eliminating the discount at this point in the transition could have calamitous results. The reality is that the UHF-VHF disparity will persist at least so long as broadcasters continue to operate their NTSC stations, and the Commission's rules must take proper account of this fact.

Another important prudential reason for retaining the discount until the close of the transition is the administrative headaches that removal would create. Because the Commission has repeatedly acknowledged the inferiority of UHF stations' reach, it cannot now simply find that UHF and VHF stations have reached technical parity.

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[27] See Paxson Comments at 18-19; Paxson 1998 Biennial Reply Comments at 9-10.

[28] See *id.* at 11078.

Instead, the Commission would have to replace the discount with some system that would calculate the actual coverage of each station.[29] The time and resources this endeavor would require, however, cannot be justified when the end result would be a system that would only be employed for a limited number of years before the close of the transition. Indeed. by the time stations and the Commission could agree about each stations' "actual" coverage, the transition would be near completion, and the same process would need to be undertaken for the DTV universe.

C. ELIMINATING THE UHF DISCOUNT IS OUTSIDE THE PROPER PURVIEW OF THE BIENNIAL, REVIEW PROCESS.

Finally, as Paxson pointed out in its Comments, Congress did not create the biennial review process as a vehicle for increasing ownership restrictions on the most vulnerable broadcasters.[30] UCC's proposed elimination of the UHF discount would do precisely that by imposing significant new ownership restrictions on the station owners that can least afford them.

UCC's drive to re-regulate UHF broadcasters flies in the face of what the D.C Circuit has recognized to be the fundamentally deregulatory intent of the biennial review process.[31] To enact such a new restriction, the Commission would be under the doubly heavy burden of justifying a complete policy about-face without any new underlying rationale, and describing the public interest harms that have flown from maintenance of

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[29] *See* 1998 Biennial Review at 11079.

[30] *See* Paxson Comments at 21.

[31] *See Fox Television Stations v. FCC*, 280 F.3d 1027, 1033 (2000).

the UHF discount.[32] As Paxson has demonstrated, no such harms exist, and in any case, none have been entered into the record of this proceeding.

III. CONCLUSION

For these reasons, as well as those laid out in Paxson's initial Comments, the Commission should relax its television broadcast ownership restrictions and maintain the UHF discount. No evidence supports continuation of the current national or local ownership restrictions or the newspaper/broadcast or radio/television restrictions. Accordingly, the Commission cannot satisfy the rigorous legal standard imposed by Congress and the D.C. Circuit for justifying these restrictions. Congress and the Courts have commanded deregulation, and now is the time to carry out that order.

Regardless of the Commission's decision with respect to its ownership restrictions, however, the Commission must reject UCC's call for repeal of the UHF discount and consequent re-regulation of UHF broadcasters. The discount has and continues to partially balance the competitive playing field between UHF and VHF broadcasters. By creating economies of scale that permit UHF station owners to surmount the inherent competitive handicaps of UHF broadcasting, the discount continues to play an important role in making the broadcast industry more competitive. This guarantees better and more diverse services to television viewers, without harm to the public, making the UHF discount the very essence of "necessary in the public

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[32] Motor Vehicle Mfrs. *Ass'n* of *U.S.*, Inc. *v.* State Farm Mut. Auto. *Ins.* Co., 463 U.S. 29, 41-42 (1983) (reasoned opinion beyond that necessary to refrain from adopting a rule is required to discard a rule); *Office* of Communication *of* United Church of Christ *v.* FCC, 560 F.2d 529, 532 (2d Cir. 1977); National Wildlife Foundation *v.* Mosbacher, 1989 U.S. Dist. Lexis 9748 (D.D.C. 1989) (overturning agency order amending 2-year old rule without reasoned explanation).

interest." In the face of these significant public interest benefits, it would be grossly inappropriate for the Commission to use the deregulatory biennial review process to re-regulate UHF broadcasters.

PAXSON COMMUNICATIONS CORPORATION

By: ______________________

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Dated. February 3, 2003

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SUMMARY

The Commission must address the new competitive landscape in the video delivery and broadcast industries in a firmly deregulatory, but thoughtful way. Both Congress and the courts have instructed the Commission to remove ownership regulations that are not strictly necessary to the public interest in light of competitive conditions. This mandate must lead the Commission to remove many of its outmoded restrictions, but it must also temper its deregulation with a measure of wisdom.

So, for example, the Commission must increase the national ownership cap. Current competitive forces have rendered the current ownership cap an anti-competitive drag on broadcasters' competitive energies. At the same time, however, the Commission must maintain the UHF discount, because it still provides a realistic measure of the technical and financial obstacles to successful UHF broadcasting. There has been no development in the past two years that could possibly support the abandonment of this important competitive safeguard. The UHF discount remains an important tool in building emerging broadcast networks, as the success of PAXTV has shown. Moreover, the DTV transition has done nothing to alleviate the need for the discount thus far, and it remains too early in the transition to conclude that it ultimately will render the UHF discount unnecessary.

There are areas where the Commission is compelled to move ahead more forcefully. The Commission must immediately remove all restrictions on duopoly ownership in local markets and newspaper/broadcast cross-ownership. Moreover, the Commission must liberalize its radio/television cross-ownership rule, which has no place in a competitive local media environment. None of these rules were well-conceived in